

C2EFGARH

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 HENRY McLEAN, et al,

4 Plaintiffs,

5 v.

10 CV 3950 (DC)

6 GARAGE MANAGE CORP., et al,

7 Defendants.

8 -----x

New York, N.Y.
February 14, 2012
2:14 p.m.

9
10 Before:

11 HON. DENISE COTE,

12 District Judge

13 APPEARANCES

14 KAHN OPTON, LLP

15 Attorneys for Plaintiffs

16 STEPHEN H. KAHN

17 JUSTIN A. ZELLER, P.C.

18 Attorneys for Plaintiff Ramirez

BRANDON SCHER

19 LITTLER MENDELSON, P.C.

20 Attorneys for Defendants

21 A. MICHAEL WEBER

ELIAS J. KAHN

C2EFGARH

(Case called)

(In open court)

THE DEPUTY CLERK: McLean v. Garage Management.

Counsel, state your appearances for the record.

MR. S. KAHN: For plaintiff in the McLean suit,

Stephen H. Kahn, Kahn Opton LLP.

MR. RICHTENTHAL: For Mr. Ramirez in the related

action, Brandon Scher from the law office of Justin A. Zeller.

MR. WEBER: Good afternoon, your Honor. Michael Weber

and Elias Kahn on behalf of the defendants on both matters.

THE COURT: You're assisted at counsel table by whom,

Mr. Weber?

MS. HERZBERG: Alissa Herzberg.

MR. WEBER: And two witnesses, your Honor, for the

defendants.

THE COURT: Okay. Why don't we put the two witnesses

in the witness room. I'll ask my deputy to do that. Good.

So, counsel, I want to thank you for your submissions

of February 10th. I've read them. My chambers called counsel

this morning to request that you fill in some dates that would

be associated with the exhibits that were attached. I think

this principally concerns dates that were missing, at least I

didn't see them in the plaintiff's submission, so let's just

walk through those. For Exhibit A, what is that date?

MR. S. KAHN: That date is the date of defendant's

1 supplemental response. It is December 7, 2010. Your Honor, I
2 have documents that substantiate all of this if the Court wants
3 them.

4 THE COURT: Only if it ends up being a matter of
5 dispute. I expect it won't be. And then you make reference to
6 a document request number 5.

7 MR. S. KAHN: Yes. That was received by my office
8 under cover of letter from defense counsel dated December 15,
9 2010.

10 THE COURT: And then there are documents which are
11 associated with Exhibits C and D that were received in
12 connection with summary judgment practice?

13 MR. S. KAHN: Yes, your Honor. Exhibit C refers to
14 GMC defendant's response to plaintiffs' statement of material
15 facts and the date of defendants' response was May 13, 2011.
16 Exhibit D refers to defendants Rule 56.1 statement on its
17 summary judgment motion and that was dated April 22nd, 2011 and
18 if I might jump ahead, the Weinstein transcript exhibit was
19 from a deposition of Mr. Weinstein conducted on March 2, 2011.
20 And if your Honor would permit, I did discover one other
21 relevant transcript section. I would like to hand it up if the
22 Court would find it helpful.

23 THE COURT: Have you given it to defense counsel?

24 MR. S. KAHN: I will do so immediately. Your Honor, I
25 am handing up from the deposition of Douglas Kamm, who I

1 believe will be a witness here today later in this hearing, an
2 excerpt from his March 11, 2011 deposition exhibit. I
3 particularly direct the Court's attention to page 13, where
4 there is a several-question exchange regarding how time records
5 are compiled. And if I might hand that page up, your Honor?
6 Thank you.

7 While I'm handing things up, your Honor, you had also
8 directed me to submit --

9 THE COURT: Kamm is K-a-m-m.

10 Okay, Mr. Kahn, you wanted to say something further?

11 MR. S. KAHN: Yes, not with regard to this topic, but
12 while I am delivering documents, you also requested that I
13 provide the Court with an affirmation of mailing of the
14 requested opt out notice and exclusion form. I've given a copy
15 to Mr. Weber of my affirmation of mailing. If I may hand that
16 up also. Thank you, Judge.

17 THE COURT: Counsel, I have reviewed the materials
18 associated with the issue about the time cards, and just to put
19 this in context, fact discovery in this case closed at the end
20 of March in 2011. There was litigation over a motion to
21 dismiss and to require arbitration. There was litigation
22 associated with cross motions for summary judgment. The
23 pretrial order is due March 19th and this case is set to be
24 tried in April. So it is in that context that we are
25 discussing whether or not the plaintiffs were sufficiently on

1 notice that the time cards would be relied upon by the
2 defendants to calculate any overtime pay in this case or
3 whether the defendants during the litigation or during enough
4 of the litigation took the position that the payroll records
5 which were kept by a company called Paychex, or at least
6 through a system created by a company called Paychex were the
7 documents that the defendants felt were the records on which
8 they were going to rely for the actual hours worked, such that
9 the plaintiffs did not have sufficient notice from the
10 defendants that they had to separately inspect the time cards.

11 I've received the parties' submissions. We've talked
12 about this briefly at a prior conference or two. I'm prepared
13 to rule on this issue, but I want to make sure nobody has
14 anything that they want to say in addition to what they've
15 already submitted to me.

16 Mr. Kahn?

17 MR. S. KAHN: Yes, your Honor. I would just like to
18 advise the Court that although we've been calling this the time
19 card issue, I don't think GMC really means to dump 24,000 time
20 cards in the courthouse. I think what they're really concerned
21 about is putting their summary or analysis of these time cards
22 in the courthouse. I've still not received a copy of this
23 analysis, although I've been asking for it for some time which
24 leads me at least to infer that this is still a work in
25 progress. I don't even think it's done which shows how recent

1 this invention in this litigation is on GMC's part.

2 I'd also like to point out, and I waited to make this
3 point until I reviewed Mr. Weber's submissions to be fair to
4 him to be sure I hadn't overlooked anything, but GMC's summary
5 judgment motion was devoid of any mention whatsoever of the
6 distinction between time cards and payrolls. Certainly if they
7 identified this as an issue at the time of the summary judgment
8 motions, this is a point they would have made in support of
9 their argument that the garage managers were salary basis
10 employees.

11 So I think there's a great deal of evidence that shows
12 that GMC has just discovered or invented this defense itself
13 which means of course the plaintiffs could not have had notice
14 of it in any timely fashion. Thank you so much.

15 THE COURT: Mr. Weber, is there anything you wanted to
16 say in addition to what you've already conveyed to the Court?

17 MR. WEBER: With respect to Mr. Kahn's comment, your
18 Honor, as your Honor is well aware defendants' position has
19 been all along that the managers were all exempt and that they
20 were paid a salary. The actual time records and actually the
21 transcript from Mr. Kamm just submitted supports defendants'
22 position that Mr. Kahn was well aware that they're actually
23 paid based on the hours they worked and they worked more. But
24 the point is all along and we obviously still believe this to
25 be the case, managers were exempt, we believe they are exempt

1 and they were paid salary plus extra compensation. The actual
2 time records were relevant for that purpose. In reality, the
3 actual time they worked is very relevant for a couple of
4 reasons. One, the benefit they received from the union
5 contract.

6 As your Honor is aware, the management is covered by a
7 collective bargaining agreement. That document is attached to
8 a moving affirmation in support of summary judgment. The
9 defendants argued that they had to keep actual hours, time
10 records for benefit purposes for pension and welfare
11 contributions. The defendants were obligated to pay only on
12 the hours worked, which is why the time records reflected
13 actual time, hourly rate and hours worked. Nevertheless,
14 defendants had always taken the position they're exempt, they
15 were paid a salary, they performed exempt duties and therefore
16 they're exempt under the law. But certainly Mr. Kahn was aware
17 even based on the transcript of Mr. Kamm that he just submitted
18 they did get paid more and there were variations in the time
19 records.

20 But I think the plaintiff was always on notice that
21 there are actual time records and clearly if we lost the
22 argument before your Honor that the managers were exempt we
23 would obviously look to the actual hours worked. That's the
24 law. That's what the regulations say, that's what the law
25 says. I don't think he can say he's not aware of that argument

1 or the fact that they existed or that witnesses testified that
2 they clocked in and they clocked out. I don't think there's
3 any prejudice here whatever so far to Mr. Kahn and certainly
4 we've got a month or two if he needs documents and summaries to
5 look at them, to provide that information.

6 THE COURT: Okay. Now. Just to be precise, and I
7 don't want to suggest that you weren't, but just to make sure I
8 wasn't misled by anything that you said because I failed to
9 understand the terminology you were using, the records of the
10 hours worked, the time records are the payroll records that are
11 maintained through the Paychex system.

12 MR. WEBER: No, your Honor.

13 THE COURT: So when you held up the collective
14 bargaining agreement, that document for me to look at and said
15 that you were required to keep track because of the collective
16 bargaining agreement of the hours worked, are you telling me
17 you didn't do that through the Paychex system?

18 MR. WEBER: Not to my knowledge, your Honor.

19 THE COURT: So what system did you use if it wasn't
20 the payroll system reflected in the Paychex system?

21 MR. WEBER: To my knowledge, your Honor, there are
22 separate reporting obligations that GMC followed with respect
23 to reports to the union vis-a-vis welfare contributions and
24 pension contributions. The collective bargaining agreement
25 provides a set hourly amount -- excuse me, a dollar amount to

1 be paid per hour worked.

2 THE COURT: And what records -- are those monthly
3 records that were given to the union?

4 MR. WEBER: I believe so, your Honor.

5 THE COURT: And they were different monthly records
6 than the payroll records that were provided in the course of
7 discovery?

8 MR. WEBER: That is my understanding, your Honor.

9 THE COURT: And you've never provided those records to
10 the plaintiff?

11 MR. WEBER: No, your Honor. The records that I'm just
12 referring to submitted to the union --

13 THE COURT: Yes.

14 MR. WEBER: Those records? No.

15 THE COURT: What are those records called?

16 MR. WEBER: I'm not certain, your Honor, but I believe
17 they would be welfare and pension contribution reports
18 reflecting the hours worked for each employee each month, the
19 amount of the required contribution that varied per year and a
20 total amount, a dollar amount that would be paid, a
21 contribution paid on behalf of the employee.

22 THE COURT: Okay. So let's call those the collective
23 bargaining agreement hourly records, just so we're talking
24 about something we can all agree on at least in terms of
25 terminology. Are you contending that the collective bargaining

1 hourly records are different than the Paychex hourly records?

2 MR. WEBER: Absolutely.

3 THE COURT: And you've done that comparison?

4 MR. WEBER: I haven't, your Honor, but I know they
5 have to be different.

6 THE COURT: And you know that because?

7 MR. WEBER: I'll tell you why. I believe, your Honor,
8 there is a cap on the number of hours. On page 32 of the
9 collective bargaining agreement there is a provision that says
10 contributions in this case to the welfare plan shall be made
11 for all hours employees are required to be paid for no more
12 than 40 hours per week.

13 As your Honor knows, the Paychex records reflected
14 either 50 or 55 hours that managers were paid, that they worked
15 in each garage. It varied depending on the garage and the
16 manager. So the salary was for those hours worked and as your
17 Honor recalls the company paid the extra composition monthly as
18 a precaution to in fact overpay them for any potential overtime
19 finding. So the contract required a set salary. The company
20 paid more than that salary per week and then paid more than
21 that on the extra compensation monthly.

22 But as far as the contributions go, the collective
23 bargaining paid record, there is a cap of 40 hours. So they
24 never would pay 50 or 55 as the Paychex records reflect.

25 Now, Mr. Kahn --

1 THE COURT: One minute. Are you saying, then, that
2 while the Paychex record for a particular employee might
3 reflect 50 hours of work on a particular week, the collective
4 bargaining agreement payroll records would only reflect at most
5 40 hours?

6 MR. WEBER: Exactly, your Honor.

7 THE COURT: Okay. So you are not contending that the
8 collective bargaining agreement payroll records would be an
9 accurate reflection of the hours worked?

10 MR. WEBER: Yes, I would, your Honor. And Mr. Kahn's
11 clients knew exactly -- in fact, some of them were union
12 representatives. They knew exactly what contributions were
13 being made on their behalf. So if they worked 35 hours one
14 week there would be contributions made to pension and welfare
15 funds for 35 hours.

16 THE COURT: Right. But under the hypothetical, which
17 is the more customary hypothetical here, for somebody who
18 worked 50 or 60 hours a week, the Paychex records are going to
19 reflect 50 or 60 hours a week, but the collective bargaining
20 agreement submission, its payroll record, will only reflect 40
21 hours a week. Do I understand correctly what you're saying to
22 me?

23 MR. WEBER: One caveat, your Honor. Up to 40 hours.
24 So it's the actual hours worked with a 40 cap. The --

25 THE COURT: Yes, our hypothetical is the employee

1 actually worked 50 hours a week and that's what's shown in the
2 Paychex payroll record. What number is going to be shown in
3 our hypothetical for the collective bargaining agreement
4 payroll record?

5 MR. WEBER: 40 hours.

6 THE COURT: Okay. So that 40 hours in the collective
7 bargaining agreement payroll record is not the number of actual
8 hours worked because of the cap in the collective bargaining
9 agreement, is that right?

10 MR. WEBER: With one exception, your Honor. The
11 Paychex payroll record that reflected 50 hours didn't
12 necessarily mean the manager worked 50 hours. If your
13 hypothetical is if they worked 50 hours, that's correct, your
14 Honor, it would only reflect 40 hours for contribution purposes
15 under the collective bargaining agreement.

16 THE COURT: Okay. So we cannot rely on the collective
17 bargaining agreement records to reflect actual hours worked
18 because there was a cap that was placed on those reports.

19 MR. WEBER: That's a fair statement, your Honor.

20 THE COURT: And you never identified those reports as
21 being, to the plaintiffs during this litigation, as reflecting
22 the actual hours worked.

23 MR. WEBER: What we argued, your Honor, in our
24 motion --

25 THE COURT: No, no, no. In discovery you never

1 identified to the plaintiffs or in the motion practice you
2 never identified to the plaintiffs that the collective
3 bargaining agreement reports were the most accurate record of
4 the actual number of hours worked.

5 MR. WEBER: We wouldn't, nor would it be accurate to
6 say that.

7 THE COURT: Okay.

8 MR. WEBER: We wouldn't make that representation. It
9 wouldn't be accurate.

10 THE COURT: Okay. Good. I just wanted to make sure I
11 understood your argument.

12 MR. WEBER: But, your Honor, we did make the argument
13 and we did attach the collective bargaining agreement to our
14 papers as to why there were hourly rates on the payroll records
15 and that we were obligated to make contributions based on hours
16 worked. That was in our submission in summary judgment. So
17 plaintiff is well aware of those arguments. We wouldn't, as
18 your Honor obviously observed, we wouldn't make the argument
19 those were actual hours, but we did make it as to why the
20 hourly rates were on documents. Your Honor would think, well,
21 if they're salaried employees why do you have an hourly rate on
22 the documents. I think that was probably a factor in your
23 Honor's thinking. And my argument is because they are covered
24 by a collective bargaining agreement. They're obligated.

25 THE COURT: I understood that then, that that was your

1 argument and explanation in connection with the summary
2 judgment practice.

3 MR. WEBER: And I've not been successful in persuading
4 your Honor, but I keep trying.

5 THE COURT: Good. Good. Thank you.

6 MR. WEBER: One more point, your Honor, and it goes to
7 the hearing we're about to have.

8 THE COURT: Sure.

9 MR. WEBER: This is a fairly comprehensive document.
10 Mr. Kahn's clients are represented by a union. They have all
11 kinds of protections here with respect to grievances and
12 arbitrations and protections for any bad behavior by an
13 employer and as your Honor may imagine, the plaintiffs are not
14 shy. They are well represented by Mr. Kahn and well
15 represented by the union. There are lots of protections here
16 and I just want to highlight that for our discussion here
17 that's about to take place.

18 THE COURT: Good. Thank you. And before we get to
19 that part of the hearing which addresses a separate issue and
20 that is to the reliability of the opt out notices, I just
21 wanted to bring to a conclusion the issue about the time cards.
22 And Mr. Weber, you did indirectly respond to Mr. Kahn's point
23 that he made orally today and I guess at our last conference,
24 and I just wanted to give you a chance, since I may have
25 interrupted what you had planned to say, and that is that you

1 still have not given him the summary of what you think the
2 actual hours are that were worked by the individual employees.

3 MR. WEBER: Your Honor, we've given him about a third
4 to 40 percent of the time cards. As Mr. Kahn observed, there's
5 tens of thousands of these documents and when your Honor ruled
6 against us, the client has been in the process of trying to go
7 through 24 some-odd thousand documents to provide a summary, so
8 we've been able to give him about a third of the documents so
9 he has a sense of them and they've been constantly working on
10 the others and we hope to have them virtually in the next few
11 days, your Honor.

12 So he has a summary of about a third, he knows what
13 they look like. He's shaking his head, but I believe that's
14 the case.

15 THE COURT: Okay. So when you say you've given him a
16 summary of a third, does that mean that a third of the
17 employees for the period of time at issue, you have summary
18 reports on what basis; two weeks, a month, of the hours worked?

19 MR. WEBER: Six years, your Honor.

20 THE COURT: But are they monthly? How are the hours
21 aggregated in that summary report?

22 MR. WEBER: My colleague Mr. Kahn had done this, so
23 I'm asking him that question.

24 THE COURT: Good. Mr. Kahn, I'll hear directly from
25 you.

1 MR. WEBER: He says weekly, your Honor.

2 THE COURT: Okay, Mr. Kahn. Thanks so much. I know
3 you've been working hard on this.

4 MR. E. KAHN: Thank you, your Honor. Yes.

5 THE COURT: So what have you been able thus far to
6 produce and hand over to the plaintiff?

7 MR. E. KAHN: Thus far we've been able to produce
8 summaries of I believe 24 of the plaintiffs and they do contain
9 weekly reports comparing how many hours they worked on the time
10 cards versus the payroll records.

11 THE COURT: And so you've done that, okay, you've just
12 told me about 24 employees?

13 MR. E. KAHN: That's correct. From our client, I
14 believe that the analysis is either virtually all done or
15 completely done. It takes a lot of time to do this project,
16 it's not something they just figured out and can slap together
17 in a day. They've been spending many, many weeks putting this
18 together and putting together this analysis and it should be
19 all ready soon is what they've informed me.

20 THE COURT: Good. Thank you so much. Mr. -- the
21 other Mr. Kahn.

22 MR. S. KAHN: Too many Kahns in the courtroom, your
23 Honor.

24 Your Honor, what Mr. Elias Kahn said is not correct.
25 All that I received, and I received it about two weeks ago, is

1 a stack of time cards of approximately 18 inches high which I
2 haven't counted but is clearly not a third of 24,000 time cards
3 with no analysis. I just received time cards rubber banded
4 together in a box. I've received no analysis. Defendants
5 told -- in a footnote to their December 7 letter to Judge
6 Gorenstein -- said that they were conducting, I believe the
7 expression they used was an extensive analysis. All I've
8 received are 18 inches of time cards from some employees that
9 mean absolutely nothing to me other than there are time cards
10 which I already did know.

11 THE COURT: Good.

12 MR. E. KAHN: Your Honor, I do believe we did give him
13 the 24 Excel sheets. I believe we handed it to him.

14 MR. S. KAHN: No.

15 MR. E. KAHN: I believe we did.

16 THE COURT: Do you have a cover letter, Mr. Kahn?

17 MR. E. KAHN: It was in person.

18 THE COURT: You personally handed it over?

19 MR. E. KAHN: That's my recall. But again, I can
20 give -- if that is not the case I'll give them to him right
21 away. I thought I did hand them to him, your Honor.

22 THE COURT: Okay. Why don't you create a cover letter
23 or memorial e-mail or something when you make the transmission?

24 MR. E. KAHN: Sure.

25 THE COURT: Good. So that there's a record of date of

1 delivery and who delivered what to whom.

2 MR. E. KAHN: Yes. We can do that today.

3 THE COURT: Thank you so much. Okay. So here,
4 counsel, is my analysis of what we have. I very much
5 appreciate that the defendant is taking the position that the
6 payroll records, which I've referred to as the Paychex records,
7 were never meant to indicate the actual number of hours worked
8 by an individual garage manager. That's their position now.
9 And Mr. Weber has explained that the defense in this case, the
10 system of making payments and the EC bonus system and the way
11 that that system of payments and the EC bonuses worked was in
12 part driven by the collective bargaining agreement rights and
13 this company's practice within this industry.

14 The issue for me is a different one. This case was
15 filed in 2010. Its related case was filed earlier, but I'm
16 just going to focus now on McLean. McLean was filed in 2010
17 and there was a period of discovery, fact discovery that was to
18 end in late January of 2011 but ultimately was extended to late
19 March of 2011. And during that period of time when the parties
20 were conducting fact discovery of each other, it was of course
21 the plaintiff's position, well known to the defendants, that
22 there was a violation here of the FLSA and the New York Labor
23 Law, and that there was a failure to pay overtime and other
24 violations.

25 The plaintiffs made demands for documents. They

1 placed interrogatories, they made document requests, they
2 negotiated production through e-mail correspondence and
3 otherwise, and during the course of that history of fact
4 discovery through the submissions of the parties that had been
5 made to me, including the interrogatory answer of December 7,
6 2010, the response to the document request in December of 2010,
7 the January and February 2011 e-mail correspondence, repeatedly
8 the defendant told the plaintiffs that the records that
9 reflected the hours worked of the employees was the Paychex
10 system. There was nothing said that would reflect that they
11 were an unreliable record of the number of hours worked. And
12 of course that was important for the plaintiff to know because
13 its damage calculations would be driven with respect to the
14 number of hours actually worked each week by each plaintiff.

15 It had its theory of a violation of the law. The
16 defendants had their theories of the violation of the law, but
17 both sides needed to figure out what were the actual number of
18 hours worked and then you apply your legal arguments to it and
19 develop your surrounding evidence in relationship to it.

20 And while the defendant made the time cards available
21 for inspection, it never put the plaintiffs on notice that it
22 was the defendant's position that the Paychex records were
23 unreliable and only the time cards could actually reflect the
24 precise numbers of hours worked.

25 This analysis continued through the deposition

1 testimony taken in March. It continued through the summary
2 judgment presentations in April and May. Over and over again
3 it was described to the plaintiffs that the Paychex system,
4 those payroll records, reflected the actual number of hours
5 worked, and the defendant relied on the numbers of hours worked
6 from the Paychex system to do calculations.

7 The first time that the defendant took the position
8 that the Paychex system may not reliably reflect the number of
9 hours worked was apparently in a November 14, 2011 letter to
10 Judge Gorenstein, although it may have been even later, a
11 December 7, 2011 letter to the plaintiff.

12 From this history I conclude the following: Both the
13 plaintiffs and the defendant knew that there was a system in
14 which garage managers would punch a time clock. Both sets of
15 parties knew that the defendant kept payroll records. The
16 defendants took the position from the beginning of the
17 litigation and throughout fact discovery that those payroll
18 records that were part of the Paychex system were reliable
19 records of the hours actually worked. The plaintiffs had
20 access to the time cards, but no incentive to look at them
21 because it was reasonable for them to rely on the defendants'
22 representation that the Paychex payroll system reflected the
23 actual number of hours worked from the defendants' perspective.

24 Then, of course, in my late August opinion I rejected
25 the exemption argument being made to me by the defendant. I

1 ruled, among other things, that the EC bonuses were not
2 overtime payments as required by law. So it appears that
3 sometime thereafter, certainly by November, the defendant
4 started to engage on what is and has been described to me today
5 as a massive undertaking to look at individual time cards to
6 see the extent to which they do or do not match the Paychex
7 payroll records.

8 It seems to me that it's too late in the day to put
9 the burden on the plaintiff with discovery long over, ending
10 last March, to invest its time and energy in doing this
11 extraordinarily burdensome project that the defendant is now
12 undertaking. And therefore, I'm going to bar from trial
13 evidence that the time cards reflect fewer hours than the
14 Paychex payroll records.

15 MR. WEBER: And if I may, obviously, we take exception
16 to the ruling, but I just want to clarify a point. Throughout
17 our position the defendants have taken a position that their
18 managers are exempt so the extra hours are irrelevant, they're
19 irrelevant. I don't think we ever said they actually worked 50
20 or 55 because that's what the Paychex records said. It
21 couldn't say that, it wouldn't be accurate.

22 However once you ruled and once we realized we were
23 going to face a damage trial the actual hours became relevant
24 and assuming November was the first time Mr. Kahn was aware of
25 it, he will have six months between then and trial to focus on

1 that issue. We're doing all the work and the summaries, so I
2 don't think the burden is on the plaintiff but it's clearly on
3 us to make our case as to what are the actual hours worked.

4 THE COURT: So, Mr. Weber, I have ruled and the record
5 as created by the parties' submission is different, I think,
6 than what you describe. The defendants did repeatedly describe
7 the Paychex records as reflecting the actual hours worked. So
8 I don't want to argue with you, Mr. Weber. We have other
9 things to do this afternoon.

10 Mr. Kahn?

11 MR. S. KAHN: May I just for the sake of completeness
12 add one brief point to which the parties will agree? We've
13 been referring to the payroll records as the Paychex records.
14 There was a brief period of time before Paychex began to
15 administer GMC's records that very similar payroll records were
16 maintained in-house by GMC. I don't think in any way that
17 affects any argument that the parties have made, which is why
18 the parties haven't pointed this out to the Court before. We
19 were remiss, but I did want to note that on the record, your
20 Honor. Thank you.

21 THE COURT: Okay. So, let's turn to the topic for
22 today, and, Mr. Weber, the did you want to describe the two
23 witnesses and then make a brief proffer with respect to what
24 evidence they have to offer?

25 MR. WEBER: Yes, your Honor. We'd like to call two

1 witnesses today. Mike Isaac is a supervisor for defendant GMC.
2 Part of his job is not only supervising the garage managers but
3 he frequents every garage weekly to do audits and spot checks
4 and talk to managers, so he can speak firsthand as to the issue
5 that's before your Honor, whether there was coercion, how it
6 came about that managers chose to opt out. So he's the front
7 line person that can address those issues.

8 The second person is Douglas Kamm. Mr. Kamm is really
9 in charge of human resources and payroll and payment-related
10 issues. Was with the company from 1986 to 2000 and then back
11 again in 2010 and he's been very involved in these issues as
12 well. So those are two witnesses we'd like to present today,
13 your Honor.

14 THE COURT: Is it Mr. Isaac who had the direct
15 conversations with the individuals who opted out?

16 THE WITNESS: Correct, your Honor.

17 THE COURT: And did Mr. Kamm have direct conversations
18 with any of those individuals?

19 MR. WEBER: I think one or two, but primarily with Mr.
20 Isaac and he can give sort of an overview as the company
21 representative as to what happened.

22 THE COURT: So should we start with Mr. Isaac?

23 MR. WEBER: Yes, your Honor, I'd like to.

24 THE COURT: Good.

25 MR. WEBER: May I?

1 THE COURT: You may bring him or should I ask the
2 deputy? You can get him? Thank you.

3 MICHAEL ISAAC,

4 called as a witness by the Defendants,

5 having been duly sworn, testified as follows:

6 THE COURT: Counsel.

7 DIRECT EXAMINATION

8 BY MR. WEBER:

9 Q. Mr. Isaac, where are you employed?

10 A. Garage Management Corporation.

11 Q. What is your current title?

12 A. Field supervisor in charge of the operation.

13 Q. And how long have you been employed by GMC?

14 A. 25 years.

15 Q. What was your first position when you started?

16 A. I started as a supervisor working under the supervisor in
17 charge at the time.

18 Q. In your current position what are your day-to-day job
19 responsibilities?

20 A. It varies from doing the budget for the garages, payroll,
21 marketing. I mean, the whole operation. Maintenance.

22 Q. Does your job require you to be out in the field visiting
23 garages on a regular basis?

24 A. Yes, it is.

25 Q. Could you describe what your day-to-day responsibilities

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Isaac - direct

1 are vis-a-vis the garage managers?

2 A. I confer on a daily basis with the managers regarding the
3 problems that pertain to the garage; staffing, business,
4 regular operation.

5 Q. And how many managers are you supervising at the current
6 time?

7 A. 63.

8 Q. Do you have a practice of visiting garages on a weekly
9 basis?

10 A. Yes.

11 Q. What is that practice?

12 A. I cover about 12 garages on a daily basis.

13 Q. How many, I'm sorry?

14 A. 12.

15 Q. Is that approximately one garage per week each week of the
16 month?

17 A. Correct.

18 Q. And when you go to each garage, what do you do when you go
19 there?

20 A. It varies. I do audits, I check the garage, physically
21 check to see whether the cars have tickets, that the monthlies
22 correspond with the accounts receivable system; walk the
23 neighborhood, see the competitors and all that.

24 Q. Do you actually see each garage manager on each visit?

25 A. Yes.

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Isaac - direct

1 THE COURT: I'm sorry, Mr. Weber. Could you review
2 again how many visits that is with an individual garage per
3 month?

4 MR. WEBER: Well, your Honor, as I understand Mr.
5 Isaac's testimony, there's about 63 garages under his
6 supervision. He visits 12 a day or 60 some a week. My
7 understanding, correct me, Mr. Isaac, if I'm wrong, that he
8 visits each garage once a week.

9 Q. Is that correct, Mr. Isaac?

10 A. Yes, it is. Yes.

11 MR. WEBER: Your Honor, does that clarify the
12 question?

13 THE COURT: Yes. Thank you so much.

14 Q. Let me direct your attention to the purpose of today's
15 hearing. Did you become aware at some point about this lawsuit
16 that was filed on behalf of garage managers?

17 A. Yes, I did.

18 Q. And were you aware that it had to do with a question of
19 whether they were entitled to overtime or not?

20 A. Yes, I did.

21 Q. And were you aware that this was being treated as a class
22 action?

23 A. Yes, I did.

24 Q. And did you become aware at one point in time whether there
25 was a question of whether the managers understood that they had

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Isaac - direct

1 a right to opt out of the case?

2 A. Yes.

3 Q. And tell me how you became aware of that understanding.

4 A. There were -- we were contacted, I was contacted by one of
5 the garage managers that received the opt-out letter.

6 Q. Who contacted you?

7 A. His name is Arnold Herrera.

8 Q. And when did Mr. Herrera contact you?

9 A. At the beginning of January, first week of January.

10 Q. And what did he say to you, if you can recall?

11 A. He said that he had received a letter from the office of
12 Mr. Kahn.

13 MR. S. KAHN: I'm sorry, had or had not?

14 MR. WEBER: I think he said he had received.

15 A. Had received a letter.

16 Q. From Mr. Stephen Kahn's office?

17 A. From Mr. Stephen Kahn's office, there was a form in it to
18 either stay in the lawsuit or to opt out of the lawsuit.

19 Q. And why was he calling you?

20 A. He told me that he received it and there were, when he
21 spoke to a couple of his friends, the other managers, that they
22 had said that they did not receive the same form.

23 Q. They did not receive the same form?

24 A. They did not receive the same form, correct.

25 Q. What was the purpose of Mr. Herrera's call to you?

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Isaac - direct

1 MR. S. KAHN: Objection.

2 THE COURT: Sustained.

3 Q. If you know.

4 THE COURT: Sustained.

5 MR. WEBER: I'll restate that.

6 Q. Did Mr. Herrera state why he was calling you?

7 A. Yes. He said that when he spoke to the other guys, they
8 were asking him why they didn't receive the same form.

9 Q. And what if anything did you say to Mr. Herrera?

10 A. I told him I didn't know anything about it, I'll check with
11 the office to see and I would get back to him.

12 Q. And what did you do next?

13 A. I spoke to Doug Kamm at the office and made him aware of
14 the situation.

15 Q. And what if anything did Mr. Kamm say to you?

16 A. He said he would speak to Gordon, Gordon Hamm, and once he
17 got an answer he would get back to me.

18 Q. And did there come a time when you spoke to Mr. Kamm again?

19 A. Yes, I did.

20 Q. Do you know approximately when that was?

21 A. I would say about the second week around the 15th probably.
22 Not exactly.

23 Q. And do you recall what Mr. Kamm said to you?

24 A. He said that Gordon Hamm had gone to the court to get
25 advice from the judge to see how we approach the situation with

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Isaac - direct

1 the letter.

2 Q. And what if anything did you do after speaking to Mr. Kamm
3 regarding that conversation?

4 A. Once -- after he told me that, I waited to see what the
5 decision was and I got a call from him a couple of days later
6 and said that Gordon Hamm was at the court and the judge had
7 instructed us to provide the letters to the managers that ask
8 for it.

9 Q. To provide letters to the managers that asked for them.

10 A. Correct.

11 Q. And what if anything did you do next regarding providing
12 information to managers?

13 A. I didn't speak to them back, but Doug Kamm spoke to Arnold
14 afterwards.

15 THE COURT: Excuse me. Who spoke to whom?

16 THE WITNESS: Doug Kamm, director of personnel.

17 THE COURT: Spoke to whom?

18 THE WITNESS: To Arnold. Arnold had called Doug
19 again --

20 THE COURT: To --

21 MR. WEBER: Arnold Herrera, your Honor.

22 THE COURT: Thank you.

23 MR. WEBER: One of the garage managers that Mr. Isaac
24 mentioned before.

25 Q. Did there come a time when Mr. Herrera or anyone else

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Isaac - direct

1 called you regarding the forms that we're talking about?

2 A. No.

3 Q. Did there come a time when you had any conversations with
4 managers about the exclusion forms that we're talking about?

5 A. Can you repeat that again?

6 Q. Sure. In the process of your job in visiting garages, did
7 there come a time when any manager spoke to you about the
8 exclusion forms?

9 A. Yes, there did.

10 Q. And when was the first time you had a conversation with a
11 manager about the exclusion forms?

12 A. After Doug Kamm had received the forms he made copies of
13 the packages and had asked me to deliver the packages to Arnold
14 who had asked for them and Javier Sanchez, that's the manager
15 that called Doug on the same subject.

16 Q. Mr. Kamm told you that these two garage managers had asked
17 for the package?

18 A. Correct.

19 Q. Relating to the exclusion?

20 A. Correct.

21 MR. S. KAHN: Could I have that second name again?

22 I'm sorry.

23 Q. Could you mention the second name?

24 A. Javier Sanchez.

25 MR. S. KAHN: Thank you.

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Isaac - direct

1 Q. This was approximately in January of this year?

2 MR. S. KAHN: Objection.

3 THE COURT: Sustained.

4 Q. When approximately did you speak to Mr. Sanchez or
5 Mr. Herrera about the package?

6 A. The second week of January.

7 Q. Did there come a time when you met with Mr. Herrera and/or
8 Mr. Sanchez and provided the package they were talking about?

9 MR. S. KAHN: Objection.

10 THE COURT: Overruled.

11 A. Yes.

12 Q. When was that?

13 A. That was January, it might have been January 18th.

14 Q. Can you tell me what you said to Mr. Herrera, for example,
15 concerning the package?

16 A. When I went to both of them, I told them these are the
17 forms that you asked for.

18 Q. What if anything did they say in response?

19 A. Well, they said thanks, and they asked me that there were
20 other managers that had asked for more forms, for the same
21 forms.

22 Q. They said to you that managers said to them --

23 A. That they needed more forms to give to all the managers
24 that asked for them.

25 Q. Did you give them the forms?

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Isaac - direct

1 A. Yes, I did.

2 Q. Do you know approximately how many forms you gave them?

3 A. I would say half a dozen to each person.

4 Q. Did there come a time when you met with Mr. Sanchez and
5 Mr. Herrera that you met with other managers regarding the
6 exclusion forms?

7 A. Yes, I did.

8 Q. When was the next time you met with a manager?

9 A. After I left Arnold Herrera, he called me and said that
10 Emilio from the 12th Street, Emilio, the last name escapes me
11 now.

12 Q. Orjuela?

13 A. Orjuela. He spoke to Emilio Orjuela and Emilio wanted the
14 form. So Emilio was at 12th Street and Arnold was at 94th
15 Street. So he told me that Emilio needed the forms, so I went
16 back to the office to get more copies to give to Emilio.

17 Q. And did you then go meet with Emilio?

18 A. Yes, I did.

19 Q. And what did you say to him and what did he say to you?

20 A. I told Emilio these are the forms that Arnold told me that
21 you needed.

22 Q. What did he say in response?

23 A. He said, "Thank you very much."

24 Q. When was the next time you had a conversation with the
25 manager about the exclusion forms?

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Isaac - direct

1 A. When I went back to the office to get more forms to give
2 one of them to Emilio, I stopped at the Narragansett Garage
3 where Bolivar Cartabena, he's a manager. So when he got out
4 and he told me, by the way, I got a call from Arnold regarding
5 the exclusion form, do you have any with you?

6 Q. He initiated the conversation?

7 A. Yes, he did.

8 Q. And what if anything did you say in response?

9 A. I said I don't have them, I'm picking up copies from the
10 office and when I come back I'll give them to you.

11 Q. What if anything did he say to you?

12 A. He said okay.

13 Q. When was the next time you spoke to a manager regarding the
14 exclusion forms?

15 A. After I gave him the forms he told me John Camidge and Joe
16 Bensey, two managers on the west side, one is at 49th Street
17 and the other one on 48th Street, he said they too were looking
18 for forms.

19 Q. What if anything did you do in response to the comment
20 regarding Mr. Camidge and Mr. Bensey?

21 A. I went to both of them and delivered the forms.

22 Q. And what did they say in response when you provided the
23 form?

24 A. They said thank you.

25 Q. Did there come a time when you spoke with any other manager

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Isaac - direct

1 regarding the exclusion forms?

2 A. Yes.

3 Q. Who was that?

4 A. On the second day I spoke to John from Belmont.

5 Q. Is that Calderon?

6 A. John Calderon.

7 Q. When did you speak with Mr. Calderon?

8 A. I would say on Friday, because that was not the same day.

9 It was not Thursday, the same day that -- because Arnold had
10 spoken to John the next day.

11 Q. What was the basis for you to speak to Mr. Calderon on
12 Friday?

13 A. He was one of the managers that Arnold told me that needed
14 a form.

15 Q. And when you saw Mr. Calderon that Friday, what if anything
16 did you say to him and what did he say to you?

17 A. I told him these are the forms that you requested from
18 Arnold and he said yes.

19 Q. Can you recall the other managers that you spoke with
20 regarding the exclusion forms?

21 A. I spoke to Lionel Jean-Baptiste on East 83rd Street.

22 Q. Tell me about your conversation with Mr. Baptiste?

23 A. When I got to Baptiste's garage, he asked me for the form.
24 Arnold didn't give me Baptiste's name.

25 Q. Did you initiate the conversation with Mr. Baptiste or did

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Isaac - direct

1 he?

2 A. No, I did not, because -- apparently from Thursday to the
3 next day there were conversation among the managers which, you
4 know, I didn't know whether it was from Arnold or not. But
5 these guys came to me and asked me directly.

6 Q. Do you recall any other managers you spoke with regarding
7 the exclusion form?

8 A. Raymond Rosa.

9 Q. And when did you speak with Mr. Rosa?

10 A. Must have been on Friday.

11 Q. And again, tell me the conversation you had with him?

12 A. Raymond told me, he said, "Mike, I understand that there
13 are forms given out to opt out of the lawsuit. I never
14 received mine."

15 Q. And what if anything did you do in response to his comment?

16 A. So I asked him, "Do you need a form?" And he said, "Yes."

17 Q. Do you recall speaking to any other managers regarding the
18 exclusion forms?

19 A. Danny Veras from 82nd Street. Arnold told me that he
20 needed a form and I went by his garage. When I got there, I
21 couldn't enter the garage because, you know, it was a traffic
22 jam, so I double parked my car in the street. He was sitting
23 in a vehicle in front of the garage. So I told him, "These are
24 the forms that you requested."

25 He said, "Do I need to fill them now?"

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Isaac - direct

1 And I told him, "No, you read the instructions." And
2 I left.

3 Q. Was there anything else discussed with that individual at
4 that time?

5 A. No.

6 Q. Do you recall any other managers you spoke with regarding
7 the exclusion forms?

8 A. Henry Russell asked me. That was either Monday or Tuesday.
9 He asked me for the forms.

10 Q. Did you see Mr. Russell on one of your daily stops?

11 A. On a regular visit.

12 Q. And do you recall who started the conversation regarding
13 the forms?

14 A. He did.

15 Q. What did he say?

16 A. He said that I understand that there are some exclusion
17 forms, that he never received his, do I have a copy.

18 Q. Do you recall speaking to another manager regarding the
19 exclusion forms? Do you recall speak to Emil Solimon?

20 A. Yes.

21 Q. When did you --

22 A. I spoke to Emil. It's got to be Friday. Again, Emil asked
23 me for the forms. His exact words were, "Listen, I was never
24 in the lawsuit. I understand there's a form to fill out. Do
25 you have the form?" And I told him yes.

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Isaac - direct

1 Q. Did you ever speak to a Pablo Mayorgo?

2 A. No, I have not. Javier, I believe Javier spoke to him.

3 Q. You never provided him any forms?

4 A. Not to my recollection.

5 Q. Did you ever speak to Orlando Mira?

6 A. No, I did not.

7 Q. Do you know if anyone spoke to him?

8 A. Javier also spoke to him.

9 Q. Did you ever speak to somebody by the name of James Isaac?

10 A. Yes, I did.

11 Q. Could you tell the Court who James Isaac is?

12 A. He's my son.

13 Q. Did he ever work for Garage Management Corporation?

14 A. Yes.

15 Q. He was a manager there?

16 A. Yes.

17 Q. Did he request forms from you?

18 MR. S. KAHN: Objection.

19 THE COURT: Sustained.

20 Q. What if anything did you discuss with your son regarding
21 the exclusion forms?

22 A. When he asked for them I gave it to him.

23 Q. Did you ever speak to Angel Rosa?

24 A. Yes. I said that before.

25 Q. And did you have a discussion with Mr. Rosa about the

C2EFGARH

Isaac - direct

1 exclusion forms?

2 A. He asked for the form.

3 Q. Was this on your regular --

4 A. Regular visit, yes.

5 Q. Did you ever speak to a George Sam?

6 A. Yes, I did.

7 Q. Do you recall the conversation with Mr. Sam?

8 A. Correct. He said that he was never part of the lawsuit.

9 He said, "I understand there were some forms given out. I

10 never received mine. Do you have a copy?"

11 Q. Did you ever speak to a Nelson Marmelejo?

12 A. Yes. When I got to the garage on my regular visit, Nelson
13 came out and said, "I don't need a form, all right, because I'm
14 in the lawsuit, I'm staying with it. What do you think about
15 it?"

16 I said, "Listen, it's your prerogative. You do
17 whatever you have to."

18 Q. Did you ever speak to a Carlos Florez?

19 A. Yes, I did.

20 Q. Tell me about your conversation with him.

21 A. He asked for a form and I gave it to him.

22 THE COURT: Give me that name again, counsel?

23 MR. WEBER: Carlos Florez, F-l-o-r-e-z I believe is
24 the spelling.

25 THE WITNESS: Yes.

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Isaac - direct

1 Q. Did you ever speak to Acel Rodriguez?

2 A. Yes, I did.

3 Q. Tell me about that conversation.

4 A. Arnold told me that Rodriguez needed a form.

5 Q. And did you visit his garage?

6 A. Yes, I did.

7 Q. What if anything did he say to you and you say to him?

8 A. I said these are the forms that you asked for, and he said
9 thank you.

10 Q. Did you ever speak to a Ricot Paliant?

11 A. No, I did not.

12 Q. Did you ever speak to a Paul Paliant?

13 A. No I did not.

14 Q. Did you ever speak to a Christian Gonzalez?

15 A. No, I did not.

16 Q. What about Ezechiel Middleton?

17 A. No, I did not.

18 Q. Did you ever speak to James Sampur?

19 A. No, I did not.

20 Q. What about Pierre Petit?

21 A. No, I did not.

22 Q. And Bob Tansey?

23 A. No, I did not.

24 Q. Have you ever given an exclusion form to any garage
25 managers that didn't ask for it directly or indirectly?

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Isaac - direct

1 A. No, I did not.

2 MR. WEBER: No further questions at this time, your
3 Honor.

4 THE COURT: Thank you.

5 CROSS-EXAMINATION

6 BY MR. S. KAHN:

7 Q. Mr. Isaac, how many forms did you give out all together?

8 A. I would say about 15 or 16.

9 Q. And how many workers are there all together?

10 A. 63.

11 Q. It has to be more than that, because you told us that you
12 gave out six forms to two employees. Six forms to Herrera and
13 six forms to somebody else. Who was the other person?

14 A. Javier Sanchez.

15 Q. So that's twelve right there, right?

16 A. Okay.

17 Q. So how many forms do you think you gave out?

18 A. As I said before, about 16 forms.

19 Q. Okay. Now, most of the -- well, you told us about more
20 than 16 today. I mean, I could count them if you'd like, but
21 there's a lot more than 16, isn't it?

22 A. Are you counting, are you including the 12 that I gave to
23 the guys?

24 Q. I'd like to know all the forms you gave out. How many
25 forms did you give out?

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Isaac - cross

1 A. I gave 12 -- six each to each of these two managers and I
2 personally gave out 16.

3 Q. Why did you give six each to these two managers?

4 A. Because at the time they asked for forms to give to all the
5 managers themselves.

6 Q. So you wanted to help them pass it out?

7 MR. WEBER: Objection.

8 THE COURT: Overruled.

9 A. I wanted to do what?

10 Q. You wanted to help these two guys pass out forms, correct?

11 A. They asked for the forms and I gave them to him.

12 Q. Almost nobody asked you for forms directly, isn't that
13 true?

14 A. Well, I, as I stated, there were some guys who asked me
15 directly.

16 Q. But mostly you were giving out forms to people Herrera told
17 you to give forms to, correct?

18 A. Some of them, yes.

19 Q. Did you give enough forms out so that people, the garage
20 managers started to think that this was the company's form?

21 A. Can you repeat this?

22 Q. Sure. All the managers who got the forms from you and
23 because of you, did they know whether this was a form from the
24 Court or a form from the company?

25 A. They knew it was a form from you.

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Isaac - cross

1 Q. How did they know that?

2 A. Because that's what they asked, they spoke -- when Arnold
3 spoke to me originally, he told me that the forms came from
4 Mr. Kahn's office.

5 Q. So Arnold already had a form?

6 A. Excuse me? Yes, Arnold sent his form by himself.

7 Q. I see. How many of these people that you gave forms to
8 didn't have a form from my office, do you know?

9 A. I don't.

10 Q. Did you give forms to people who already had forms?

11 A. I only gave forms to people that Arnold told me that needed
12 or asked me personally.

13 Q. How many garage -- you're called a garage supervisor,
14 right?

15 A. Correct.

16 Q. How many other garage supervisors are there?

17 A. There are five other ones.

18 Q. What are their names?

19 A. Alex Gonzalez, Thomas Hernandez, Sal Gofel.

20 Q. Dave Smythe?

21 A. Dave used to be a supervisor. He retired.

22 Q. I see. Dinero?

23 A. Steve Dinero, yes.

24 Q. Do you know, did any of them give out forms or were you the
25 only one?

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Isaac - cross

1 A. I was the only one.

2 Q. Why were you the only one?

3 A. Because I was the only one that Doug contacted.

4 Q. I see. What did Doug tell you the rules were about giving
5 out forms?

6 A. He said to give the forms to managers that asked for them.

7 Q. Well, you gave the forms out to more than just the
8 managers -- did he say the managers who asked you?

9 A. Managers that asked for the forms.

10 Q. He was that general or did he say something more specific,
11 sir?

12 A. That's what he said.

13 Q. So you wound up giving forms to managers who didn't ask you
14 for them, did you?

15 A. Well --

16 Q. Excuse me, could you just answer my question?

17 MR. WEBER: Your Honor, could you let the witness
18 finish the answer, please.

19 THE COURT: Yes. Don't interrupt the witness.

20 MR. WEBER: Mr. Isaac, you can finish the answer.

21 A. I went to the managers who spoke to Arnold and asked Arnold
22 for forms or Javier.

23 Q. You don't know that they asked Arnold for forms, he just
24 told you that, isn't that correct?

25 A. Yes.

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Isaac - cross

1 Q. So you don't know if Arnold was telling you the truth?

2 A. Well, when I went to the garage I said these are the forms
3 that you asked for and they said yes, so I assume that they
4 spoke to them.

5 Q. Do you remember giving an affidavit on about February 1
6 about passing out these forms?

7 A. Yes, I did.

8 Q. I'd like to ask you some questions about that afternoon.
9 Would you like a copy of it in your hand when I ask you those
10 questions?

11 A. Yes, please.

12 MR. S. KAHN: Your Honor, may I approach the witness?

13 THE COURT: Yes.

14 Q. Mr. Isaac, I'm handing you what appears to be a copy of
15 your affidavit dated February 1, 2012 and I've marked it
16 Plaintiff's Exhibit 1. I've also handed another copy to
17 Mr. Weber and a copy to the Court. Do you want to take a
18 moment and look at that again so you're familiar with it?

19 THE COURT: Place your question, counsel.

20 MR. S. KAHN: Sure.

21 Q. You said in that, say in that affidavit that garage
22 managers contacted GMC to notify us that they had not received
23 the necessary paperwork. Who was that?

24 A. That was Arnold Herrera and Javier Sanchez.

25 Q. But Arnold told you he had received the paperwork, hadn't

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Isaac - cross

1 he?

2 A. Arnold told me what?

3 Q. Didn't Arnold say he got the paperwork?

4 A. Arnold said, originally that he had the papers himself,
5 yes.

6 Q. So then Arnold wasn't one of the people who contacted GMC
7 to notify us that they had not received the paperwork because
8 Arnold got the paperwork, correct?

9 A. Yes, Arnold said that he got his papers but the managers
10 spoke to him that they did not receive the paperwork.

11 Q. So who were the managers that contacted GMC to notify GMC
12 that they did not receive the paperwork? That's what you said
13 in your affidavit so I'd like to know who they are.

14 A. Javier Sanchez was one of them, okay? And when Arnold,
15 when Arnold called the office, we were under the impression
16 that he didn't have it originally.

17 Q. What date did he call the office?

18 A. You have to speak to Doug. I don't remember the date.

19 Q. He didn't speak to you?

20 A. He didn't speak to me when --

21 MR. WEBER: Your Honor --

22 A. He didn't speak to me when he called the office.

23 Q. So you don't know what Arnold said when he called the
24 office do you?

25 A. No, but when he spoke to me before we went to Court, before

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Isaac - cross

1 Gordon Hamm went to Court he told me specifically there are
2 managers that didn't receive the forms and they wanted to know
3 what to do.

4 Q. Now, your affidavit said garage managers contacted GMC that
5 they hadn't received the paperwork. Who else besides Arnold,
6 if that's what he did?

7 A. Well, I know of Arnold and Javier.

8 Q. Did anybody walk up to you out of the blue and start a
9 conversation, any garage manager walk up to you and say oh, I
10 don't have the paperwork?

11 A. Prior to speaking to Arnold or afterwards?

12 Q. Any time.

13 A. Yes.

14 Q. Who?

15 A. Bolivar Cartabena.

16 Q. Who else?

17 A. Lionel Baptiste, Jean Baptiste.

18 Q. Who else?

19 A. Emil Solimon.

20 Q. Solimon.

21 A. I could name a few, I mean --

22 Q. Are there any others?

23 A. Henry Russell.

24 Q. Russell.

25 A. Yes.

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Isaac - cross

1 Q. Any others?

2 A. Sam George.

3 Q. Anyone else? I'm asking about people who walked up to you,
4 started a conversation and said I don't have the court forms.

5 MR. WEBER: Your Honor, I would ask that the list be
6 provided to the witness to refresh his recollection.

7 THE COURT: Overruled.

8 A. From the top of my head that's pretty much.

9 Q. So everybody else you gave a form to is a person who did
10 not walk up to you and start a conversation saying I didn't get
11 the court form.

12 MR. WEBER: Objection.

13 Q. Is that correct?

14 THE COURT: Overruled.

15 A. As I stated before, the rest of the people that I spoke to
16 were, the names were given to me either by Arnold or Javier.

17 Q. So everybody else you gave a form to, except for Sam
18 George, Russell, Cartabena, Baptiste and Solimon, everybody
19 else is a person who did not walk up to you and start a
20 conversation saying I didn't get a form, is that correct?

21 A. That's correct.

22 Q. You say in your affidavit that you were asked to deliver
23 the forms to the manager who contacted GMC. Who asked you to
24 do that, please?

25 A. Doug Kamm.

C2EFGARH

Isaac - cross

1 Q. What was the date that he did that?

2 A. Must be the 18th. The 17th or the 18th. One of those.

3 Q. You say in your affidavit, "In some cases there was
4 confusion where the manager did not understand why they
5 received it from the Court because they did not think that they
6 were part of this suit." Do you see that in your affidavit?

7 A. Yes, I do.

8 Q. Okay. Tell me, first of all, who are these managers?

9 A. These managers, there was a group of managers that never
10 signed on --

11 Q. I'd like to know their names, I'm sorry. What are the
12 names of the managers? I'll ask it more carefully, then. What
13 are the names of the managers who were confused because they
14 didn't understand why they received the form from the Court
15 because they didn't think they were part of the suit?

16 A. Henry Russell was one of them.

17 Q. Who else?

18 A. Javier Sanchez.

19 Q. Who else?

20 A. Bolivar Cartabena.

21 Q. Who else?

22 A. My son, James Isaac.

23 Q. Who else?

24 A. Did I give Lionel Jean Baptiste?

25 Q. Anyone else?

C2EFGARH

Isaac - cross

1 A. Emil Solimon.

2 Q. These are all people who told you that I was confused, I
3 don't understand why I received the forms from the Court
4 because I didn't think I was part of the lawsuit?

5 A. Correct.

6 Q. So these are all people who did have the form, aren't they?

7 A. Excuse me?

8 Q. All these people did get the form, didn't they?

9 A. Not necessarily.

10 Q. Well, they told you that they were confused that they got
11 the form, so they must have had the form, right? It's got to
12 be one or the other, sir.

13 A. They said they were confused because they got the form,
14 that's what I said? What I said is they were confused that
15 they were in a lawsuit, not that they got the form.

16 Q. Well, that's not what your affidavit says, is it?

17 MR. WEBER: Objection. What part of the affidavit do
18 you disagree with?

19 THE COURT: Read the sentence to him.

20 MR. S. KAHN: Your Honor, may I approach? I'm afraid
21 I gave all my copies away and I'm reading from my notes. I
22 just need to look at the affidavit myself. I'm so sorry.

23 Q. I'm looking at paragraph number 4. If you count about
24 eight lines down, the first word at the margin on the left is
25 managers and then it says -- do you see where I am?

C2EFGARH

Isaac - cross

1 A. Yes, I see.

2 Q. And then it says, quote, "In some cases there was confusion
3 where the manager did not understand why they received it from
4 the Court because they did not think they were part of the
5 suit," close quote. So all those managers got the form, didn't
6 they?

7 A. Well, they claimed they did not.

8 Q. Pardon me? You'll have to explain it.

9 A. Explain which one?

10 Q. Well, your affidavit says they did get the form, doesn't
11 it? I don't want to confuse you.

12 A. Yeah, I'm not confused, either. When a manager tells me he
13 did not receive a form, I gave it to him.

14 Q. But all of these managers you just identified; Baptiste
15 Russell, Sanchez, Cartabena, your son James and Solimon, they
16 said they did receive the form, they were puzzled that they got
17 it. Which is it? Just tell us.

18 A. Well, I'll tell you exactly what it is. They did not get
19 the form, according to them, okay, and it's probably a misquote
20 here as far as saying they're talking about the paperwork.
21 What I meant was talking about the lawsuit itself, not the
22 paperwork.

23 Q. Let's talk about your son James.

24 A. Okay.

25 Q. What date did you give your son James the exclusion form?

C2EFGARH

Isaac - cross

1 A. Might have been Thursday the 18th.

2 Q. Thursday the 18th. Was he employed by the company at that
3 time?

4 A. No, he was not.

5 Q. Where were you when you gave your son James the form?

6 A. Where was I when I gave him the form?

7 Q. Yes.

8 A. He came to my house.

9 Q. Was that after work?

10 A. After work.

11 Q. In the evening?

12 A. In the evening.

13 Q. Was it a weekday or a weekend?

14 A. It was on a Thursday, so it's a weekday.

15 Q. And how did the subject of the -- when did James, I'm
16 sorry, when did James stop working for the company?

17 A. In June or July. It's got to be July.

18 Q. July 2011?

19 A. Correct.

20 Q. About six months before you had a conversation with him,
21 correct?

22 A. Correct.

23 Q. How did the subject of the forms come up at your house in
24 January, 2012 with your son James?

25 A. He got a paper form from my house. He asked me when I was

C2EFGARH

Isaac - cross

1 working.

2 Q. Say again?

3 A. He asked me when I was working on Thursday, during the day.

4 Q. I'm sure I don't understand so I'm asking again. Pardon
5 me.

6 A. He called me that day and told me about the form.

7 Q. He telephoned you?

8 A. Correct.

9 Q. What time of day did he telephone you?

10 A. I don't quite remember. Must have been the afternoon.

11 Q. Where were you when he telephoned you?

12 A. I was working.

13 Q. Did he telephone you on a cell phone?

14 A. Yes, he did.

15 Q. And what did he say?

16 A. He said he understands that a manager had called him from
17 GMC that there were forms given out, exclusion forms that he
18 never received himself.

19 Q. Did he say that he understood that the company was giving
20 out exclusion forms and he didn't get one?

21 A. Not the company. There were forms given out was originally
22 issued from your office.

23 Q. What manager was this? Did James say?

24 A. Bolivar. Bolivar Cartabena.

25 Q. So let's go through this very carefully. James called you.

C2EFGARH

Isaac - cross

1 I'd like as best you can to be like a tape recorder on replay.
2 I know you can't do that exactly, but try. What did James say
3 about this?

4 A. He said that Boli called me and said that, whether he had
5 received the forms, the exclusion forms or not, and he asked
6 Boli what forms are you talking about? And he said the lawyer
7 from, from the case had sent forms to everybody, did you
8 receive yours and he said no, he did not.

9 Q. That's what James told you?

10 A. Correct.

11 Q. You also say in your affidavit -- excuse me one second,
12 sir. Where does Mr. Cartabena work?

13 A. Narragansett garage.

14 Q. Is that also called a Red Ball garage?

15 A. No, it's not.

16 Q. Is there an office at the garage that Mr. Cartabena works
17 at?

18 A. It's a manager's office, yes.

19 Q. Is there a postage machine in that office?

20 A. I don't know. I never seen one.

21 Q. Okay. You wouldn't think there'd be a postage machine in
22 that garage office, would you?

23 A. No, there's a GMC office in the basement, but it's not part
24 of the garage.

25 Q. Is there a postage machine there?

C2EFGARH

Isaac - cross

1 A. There must be one, yes.

2 Q. Does Red Ball have anything to do with Mr. Cartabena's
3 location?

4 A. Mr. Cartabena used to work at Mason garage which no longer
5 exists and used to be part of the Red Ball group.

6 Q. Mr. Isaac, I'd like to hand you what's been marked for
7 identification as Plaintiff's Exhibit 4. Do you know how
8 Mr. Cartabena would get ahold of a Red Ball envelope?

9 A. No, I would not.

10 Q. Do you know how Mr. Cartabena would get an envelope franked
11 by Red Ball, you know, stamped with a postage machine?

12 A. I would not.

13 Q. He doesn't have one in his garage, does he?

14 A. No, there is not in the garage. There's one down in the
15 basement, as I said.

16 MR. S. KAHN: Your Honor, I'll represent to the Court
17 that this is the envelope in which Mr. Cartabena's exclusion
18 form arrived at my office. It's addressed to my office.

19 Q. Do you think somebody from management helped Mr. Cartabena
20 mail this exclusion form to me?

21 A. Along with the forms that were given to the managers, there
22 were also envelopes given to them. Not stamped envelope but
23 regular envelopes.

24 Q. Were they GMC envelopes?

25 A. They were GMC envelopes, yes.

C2EFGARH

Isaac - cross

1 Q. So you gave out GMC envelopes to all the --

2 A. No, I'm sorry, they were given by GMC but they were plain
3 envelopes.

4 Q. So GMC employees helped the managers with the envelopes
5 too, correct?

6 A. We were given the forms with the envelopes, yes.

7 Q. Were the envelopes addressed?

8 A. Your address and the Court's address also.

9 Q. That was on the envelopes?

10 A. Correct.

11 Q. Now, do you recall giving an affidavit in March 2011 in
12 this case?

13 A. No, I don't remember.

14 MR. S. KAHN: Your Honor, I'm sorry these aren't
15 premarked. I just didn't know I would be using them.

16 Q. I'm handing you a copy of what's captioned the declaration
17 of Mike Isaac and it's labeled Plaintiff's Exhibit 5. Would
18 you take a look at that, please? Is that an affidavit that you
19 gave before?

20 A. Yes, it is.

21 Q. It says in this affidavit, and I'm looking at paragraphs 4,
22 5 and 6, that you were talking about this lawsuit in May of
23 2010 with some of the very same people you talked about today;
24 John Camidge, Sam Cruz, Joe Bensey. Do you see that?

25 A. I didn't speak to Sam Cruz on the 2nd.

C2EFGARH

Isaac - cross

1 Q. You didn't speak to Sam Cruz this time around?

2 A. No.

3 Q. But you did speak to Bensey, correct?

4 A. Spoke to Bensey.

5 Q. Both times, right?

6 A. Yes.

7 Q. Spoke to Camidge both times?

8 A. Correct.

9 Q. Did you ever pass out to these people documents that GMC
10 would guarantee that they would be paid if they dropped out of
11 the lawsuit?

12 A. Yes, I did.

13 Q. How many of those documents did you pass out?

14 A. I don't remember.

15 Q. Let me ask you a question: Do you think the garage
16 managers by and large trust Mr. Chapman?

17 A. Yes, I do.

18 Q. Do you think by and large the garage managers think
19 Mr. Chapman keeps his word?

20 A. Yes, they do.

21 Q. I'd like to hand you what's been marked as Plaintiff's
22 Exhibit 3. That's a May 21, 2010 letter. Is that the letter
23 you passed out?

24 A. Yes, I did.

25 Q. How many of those did you pass out?

C2EFGARH

Isaac - cross

1 A. I don't remember.

2 Q. Did you pass them out to every garage you go to?

3 A. Possibly.

4 Q. Probably?

5 A. Probably.

6 Q. You probably passed them out to every garage manager,
7 didn't you?

8 A. It's a while back, but I gave them to quite a few people.

9 Q. Okay, and this document guarantees that they'll be paid if
10 they drop out of the lawsuit, doesn't it?

11 A. That's what it says.

12 Q. And the men trust Mr. Chapman, correct?

13 A. They do.

14 Q. Was this document ever revoked? Did the company ever say
15 we won't keep our guarantee, we wouldn't pay you if you drop
16 out of the lawsuit?

17 A. Not to my knowledge.

18 Q. So this guarantee is still in effect, as far as you know,
19 talking about Plaintiff's Exhibit 3 guarantee. Still in
20 effect?

21 A. As far as I know.

22 MR. S. KAHN: I have no more questions for this
23 witness, your Honor.

24 THE COURT: Any redirect?

25 MR. WEBER: May I have one minute, your Honor?

C2EFGARH

Isaac - cross

1 (Pause)

2 MR. WEBER: A few questions, your Honor.

3 REDIRECT EXAMINATION

4 BY MR. WEBER:

5 Q. Mr. Isaac, you were asked questions about some confusion of
6 the men concerning this lawsuit. Do you remember when the
7 managers were first in a meeting in 2010 when this lawsuit was
8 proposed?

9 MR. S. KAHN: Objection. Unless the witness has
10 firsthand knowledge.

11 THE COURT: Were you at that meeting?

12 THE WITNESS: I was not.

13 Q. Did any garage managers who attended a union meeting in
14 2010 tell you that they thought they signed an attendance sheet
15 when they were at the meeting?

16 A. Yes, they did.

17 Q. Did they subsequently learn that they signed something
18 else?

19 MR. S. KAHN: Objection.

20 Q. Were you told by any manager that they subsequently learned
21 that they signed some other document?

22 A. Yes, they did.

23 Q. What were you subsequently told by a manager or more
24 managers?

25 A. That they thought they were signing an attendance sheet and

C2EFGARH

Isaac - redirect

1 then they found out later that they were joining a lawsuit
2 brought by McLean and Rivera.

3 Q. And is that where this confusion stems from, to your
4 knowledge?

5 A. Correct.

6 MR. WEBER: No further questions.

7 MR. S. KAHN: May I, your Honor?

8 RECROSS EXAMINATION

9 BY MR. S. KAHN:

10 Q. Well, if we look at your first affidavit, the February 2012
11 affidavit, is that back in front of you?

12 A. Okay.

13 Q. Let's go to that same sentence we talked about. There
14 you're talking about confusion among garage managers who didn't
15 understand why they got a form from the Court. So that must
16 have happened very recently, correct?

17 A. In this instance.

18 Q. When was that union meeting that Mr. Weber just asked you
19 about, if you know?

20 A. Probably a year and a half ago.

21 Q. Okay. But the confusion you're talking about in your
22 February 1 affidavit is confusion about the notices that were
23 mailed on November 27, 2011, isn't it?

24 A. Yes, it was.

25 MR. S. KAHN: Okay. Thanks.

C2EFGARH

Isaac - recross

1 THE COURT: Any redirect?

2 MR. WEBER: No, your Honor.

3 THE COURT: Thank you.

4 So, Mr. Isaac, you mentioned that there are other
5 supervisors who hold positions similar to yours, and I think
6 you named five people who currently or in the past have held a
7 similar position; Mr. Gonzalez, Mr. Hernandez, Mr. Smythe,
8 Mr. Dinero and is it Mr. Gofel?

9 THE WITNESS: Gofel.

10 THE COURT: Thank you. And do they have different
11 garages that they visit or different shifts that they work on?

12 THE WITNESS: They work on different shifts.

13 THE COURT: So you cover on your shift 63 garages.

14 THE WITNESS: Correct.

15 THE COURT: And these other five supervisors cover the
16 same 63 garages but in different shifts?

17 THE WITNESS: That's correct.

18 THE COURT: It sounded like many of the people to whom
19 you delivered the forms had spoken with either Mr. Herrera or
20 Mr. Sanchez before you spoke with them. Is that fair to say?

21 THE WITNESS: That's correct.

22 THE COURT: Is there anyone that you delivered a form
23 to recently, in January that hadn't first spoken to Mr. Herrera
24 or Mr. Sanchez about the form?

25 THE WITNESS: I doubt that.

C2EFGARH

Isaac - recross

1 THE COURT: And you were given packages, some of which
2 you gave to Mr. Herrera, some of which you gave to Mr. Sanchez,
3 some of which you gave to other individuals, right?

4 THE WITNESS: Correct.

5 THE COURT: In that package -- what was in that
6 package?

7 THE WITNESS: There were three pages on the package.
8 There was the exclusion form, there was a form that said you
9 can opt in or out of it, and there was a cover, the Court
10 orders, there were three forms, I mean, three sheets.

11 THE COURT: And you said there were some envelopes?

12 THE WITNESS: Yes, also.

13 THE COURT: How many envelopes?

14 THE WITNESS: Pretty much each package had two
15 envelopes. One to the Court, addressed to the Court, the other
16 one addressed to Mr. Kahn's office.

17 THE COURT: Was there postage on the envelope?

18 THE WITNESS: No, they were not on the ones that I had
19 given out.

20 THE COURT: So each package had three pages of
21 documents and two envelopes.

22 THE WITNESS: Correct.

23 THE COURT: And were they held together by a paper
24 clip or are they inside their own larger envelope?

25 THE WITNESS: No. Three pages was stapled. The

C2EFGARH

Isaac - recross

1 envelopes were separate.

2 THE COURT: And how did you hold them all together to
3 hand out one package to one person?

4 THE WITNESS: I would hand the package along with the
5 two envelopes.

6 THE COURT: And who gave you instructions with respect
7 to handing out the two envelopes with the three pages of
8 documents?

9 THE WITNESS: Doug Kamm, the director of personnel.

10 THE COURT: Now, Mr. Herrera has worked as a garage
11 manager for a number of years?

12 THE WITNESS: That's correct.

13 THE COURT: How many years, roughly?

14 THE WITNESS: Over 15 years I'd say.

15 THE COURT: And is Mr. Sanchez also a long term
16 employee?

17 THE WITNESS: Yes, he is.

18 THE COURT: Roughly how many years do you think he's
19 worked as a garage manager?

20 THE WITNESS: I would say about 12 years; 12, 15
21 years.

22 THE COURT: If I understood correctly, Mr. Herrera had
23 received the mailed letter from Mr. Kahn's office, so he didn't
24 need another copy from you, am I right?

25 THE WITNESS: Originally that's what we understood.

C2EFGARH

Isaac - recross

1 We thought he didn't receive it either, but afterwards, after
2 the sheets were delivered, he said that he had already sent his
3 that he had received.

4 THE COURT: And with respect to Mr. Sanchez, had he
5 received, did he tell you that he had or had not received the
6 form in the mail from Mr. Kahn's office?

7 THE WITNESS: He originally told Doug Kamm that he did
8 not receive the forms.

9 THE COURT: What did he tell you?

10 THE WITNESS: Well, my contact with him was when I
11 delivered the form. I said these are the forms that you asked
12 Doug for and give it to him, so he said thank you.

13 THE COURT: Okay. I want to make sure that counsel
14 don't have additional questions for the witness based on any of
15 the questions I put to him. Let me ask you first, Mr. Weber,
16 did you have any additional questions for the witness based on
17 the questions I put to him?

18 MR. WEBER: Just to clarify the reporting
19 relationship, I think, your Honor.

20 REDIRECT EXAMINATION

21 BY MR. WEBER:

22 Q. Mr. Isaac, you're the senior supervisor of that group for
23 the company?

24 A. Yes, sir.

25 Q. And the other supervisors report to you?

C2EFGARH

Isaac - redirect

1 A. Correct.

2 Q. And they have different responsibilities than you?

3 A. Yes, they do.

4 MR. WEBER: That's all, your Honor.

5 THE COURT: Thank you. Mr. Kahn?

6 MR. S. KAHN: No, I do not, your Honor, but I would
7 like to note that the Court's, that the clerk's docket shows
8 that Arnold Herrera filed an exclusion form on about
9 January 11, 2012. I'm not looking at the docket myself, but my
10 notes. I believe my notes are accurate, your Honor.

11 THE COURT: You may step down. Thank you.

12 (Witness excused)

13 THE COURT: So, Mr. Weber, I don't know if you need to
14 call your second witness. You know better than I whether you
15 think his testimony will be helpful.

16 MR. WEBER: I think if there's any question about the
17 process, your Honor, I'd like to call him just to make sure
18 we're clear on what occurred.

19 THE COURT: Okay, fine.

20 DOUGLAS KAMM,

21 called as a witness by the Defendants,

22 having been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. WEBER:

25 Q. Mr. Kamm, can you briefly tell us your employment history

C2EFGARH

Kamm - direct

1 with GMC?

2 A. I originally worked for GMC from 1986 through 2000. I left
3 the industry to raise my three boys and came back to GMC in
4 late May of 2010 and I'm presently there.

5 Q. And can you tell us your job responsibilities during both
6 stints with the company?

7 A. I was initially hired as director of personnel. I was
8 given the mandate of setting up a personnel function for the
9 company, everything from salary administration to benefits to
10 labor relations. I wrote a company manual. I wrote rules and
11 regulations for the company and handled basic employee
12 relations problems.

13 Q. You dealt with the managers on a regular basis?

14 A. Yes, I did.

15 Q. Did you ever have any dealings with the Department of
16 Labor?

17 A. Yes, I did.

18 Q. Have you dealt with the union on union-related issues?

19 A. Yes, I have.

20 Q. Let me direct your attention to the focus of today's
21 hearing, the issue of exclusion, the opt out forms of the
22 managers. When is the first time you got involved with the
23 issue of request by managers to drop out of the lawsuit? Can
24 you recall that?

25 A. My first exposure --

C2EFGARH

Kamm - direct

1 MR. S. KAHN: Objection. There really is no request
2 for managers to drop out of a lawsuit, your Honor.

3 Q. Let me focus it more directly. Did any manager ever call
4 you about a request for exclusion forms?

5 A. Yes.

6 Q. Who was that?

7 A. The first call was from a manager Arnold Herrera.

8 Q. When did Mr. Herrera call you?

9 A. This was in the early part of January.

10 Q. What if anything did he say to you?

11 A. He told me that several managers did not want to be part of
12 this suit and he didn't know what to do and he asked my advice.

13 Q. What did you say?

14 A. I said there are forms, there are exclusion notices and
15 there are notices about the case that have been issued. I
16 would see if I could get him a copy of those forms.

17 Q. What if anything did you do after that?

18 A. I reported the phone call to my superiors, Richard Chapman
19 and Gordon Hamm, and asked for their advice as to what to do.

20 Q. Do you recall what they told you?

21 A. They said that they would seek further guidance as far as
22 whether it would be right for me to give out the notices and
23 the exclusion requests.

24 Q. What happened next related to this issue?

25 A. They followed up on my request and that evening I received

C2EFGARH

Kamm - direct

1 an e-mail from them saying that the Court had issued a ruling
2 that we may not initiate any conversation with our managers,
3 but if someone, if one of the managers initiated a conversation
4 we could provide them with the forms.

5 Q. What if anything did you do regarding providing managers
6 with forms if anything?

7 A. I made copies of the notice and the exclusion request and
8 provided them to a supervisor for distribution.

9 Q. Was that Mike Isaacs?

10 A. Yes, it was.

11 Q. Did you have any other dealings after that with any
12 managers regarding the exclusion forms?

13 A. Yes. I received a subsequent phone call from manager
14 Javier Sanchez who is the manager of the Continental Towers
15 Garage who told me he had spoken to Arnold Herrera and Arnold
16 told him to call me. He did need a form, he had never received
17 one and he did not want to be part of the case. I told him
18 that I could not discuss it with him, I would see he got a form
19 and he was to just read it and follow directions and do what he
20 felt was right.

21 Q. Did you take steps to get him a form?

22 A. I did.

23 Q. What did you do?

24 A. I made copies of the form and provided them to Mike Isaac
25 to distribute.

C2EFGARH

Kamm - direct

1 Q. Did you have any other contact with any managers regarding
2 exclusion forms?

3 A. I did not.

4 Q. Any manager express any opinion to you why they would want
5 to drop out of this lawsuit?

6 A. If I could just ask does that question refer to subsequent
7 to the guidance of the Court in January? No.

8 Q. Subsequent to the guidance from the Court?

9 A. No, I did not receive any further calls from managers.

10 MR. WEBER: No further questions, your Honor. Oh, I
11 do have one question.

12 Q. Did you give Mr. Isaac any instructions regarding what he
13 should or shouldn't do in dealing with the garage managers?

14 A. Yes, I did.

15 Q. What did you tell him?

16 A. I reiterated the Court's guidance that he should in no way
17 initiate a conversation with the managers, that he should only
18 react to requests from them and just give them the forms and
19 not comment on the case.

20 MR. WEBER: Thank you.

21 CROSS-EXAMINATION

22 BY MR. S. KAHN:

23 Q. Just a very few questions, Mr. Kamm. Did you ever read the
24 Court's October 21 order regarding permitted or banned
25 communication with the class members about this lawsuit?

C2EFGARH

Kamm - cross

1 A. Could you explain the -- the date doesn't sound familiar.

2 Could you tell me what the document said?

3 Q. Sure. I don't have it in my hand, but it said in substance
4 that GMC was not permitted to solicit withdrawals from the
5 lawsuit. Did you ever read that order?

6 A. Yes, I'm familiar with that.

7 Q. Okay. Did you read it? Or did someone just tell you about
8 it?

9 A. I'm familiar with the -- I don't remember if I read it
10 completely.

11 Q. Did you read the Court's January 17th endorsement which
12 said any garage manager who initiates conversation regarding
13 the litigation may be provided with another copy of the notice
14 and the attached exclusion request or be directed to
15 plaintiff's counsel?

16 A. Yes, I did read that.

17 Q. When did you read that?

18 A. Shortly after it was issued by the Court.

19 Q. How many copies of the form did you photocopy?

20 A. Approximately ten.

21 Q. Well, if one followed along with Mr. Isaac's testimony, I
22 calculate he gave out about 30 forms. Do you think you might
23 have given him 30 packets of forms?

24 A. No. I copied approximately ten.

25 Q. Who else copied packets of forms; do you know?

C2EFGARH

Kamm - cross

1 A. I don't know. We have clerical people in the office. I
2 don't know.

3 Q. What exactly did you say to Mr. Isaac when you gave him
4 instructions?

5 A. Be sure not to initiate any conversations with managers
6 regarding the exclusion requests. Just react to people who
7 requested them.

8 Q. Why did you speak to Mr. Isaac about this and not some
9 other garage supervisor?

10 A. Mr. Isaac is the head supervisor.

11 Q. I see. Now, you got a call from Mr. Javier Sanchez?

12 A. Yes, I did.

13 Q. And he wanted a form?

14 A. Yes, he did.

15 Q. Mr. Isaac said he delivered six forms approximately to
16 Mr. Javier Sanchez. Why would that be?

17 A. Mr. Sanchez said he had spoken in turn with several
18 managers and they also had the same problem as he did.

19 MR. S. KAHN: No further questions. Thank you, sir.

20 MR. WEBER: Your Honor --

21 REDIRECT EXAMINATION

22 BY MR. WEBER:

23 Q. Mr. Kamm, there's been a suggestion that the managers
24 wouldn't on their own withdraw from this lawsuit without some
25 influence by the company. Do you have an opinion as to why

C2EFGARH

Kamm - redirect

1 those managers withdrew?

2 MR. S. KAHN: Objection.

3 THE COURT: Sustained.

4 MR. WEBER: No further questions.

5 So, Mr. Kamm, what precisely, could you describe the
6 documents you gave to Mr. Isaac?

7 THE WITNESS: Yes, I can. There were two pages, that
8 was the notice from the Court and there was one page that was
9 the actual exclusion request form. There's three pages that I
10 distributed.

11 THE COURT: Did you give Mr. Isaac anything else
12 besides those three pages?

13 THE WITNESS: He mentioned that some managers do not
14 have, they would need envelopes and they would not have them at
15 the garage, and I gave him some envelopes, a couple of which I
16 addressed, particularly in light of the Spanish-speaking
17 managers. I felt that was okay to do.

18 THE COURT: And who did you address the envelopes to?

19 THE WITNESS: Per the instructions on the exclusion
20 request and on the notice, one of the envelopes was addressed
21 to Mr. Stephen Kahn and one to the Court, the Southern District
22 Court with the appropriate address.

23 THE COURT: So, in effect, an individual package had
24 three pages and two envelopes.

25 THE WITNESS: In some cases -- well -- no, I gave Mr.

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1 Isaac the envelopes separately and said if you need them you
2 may use these. I didn't include them with each package. The
3 packages were separate.

4 THE COURT: Counsel, do you have any questions for
5 this witness?

6 MR. S. KAHN: No, your Honor, thank you.

7 MR. WEBER: No, your Honor.

8 THE COURT: You may step down. Thank you.

9 (Witness excused)

10 THE COURT: So, Mr. Kahn, you wish to be heard.

11 MR. S. KAHN: I do, your Honor. It's very plain that
12 Garage Management violated paragraph 8 of your October 21st
13 order which limited them and told them not to solicit
14 withdrawals and they violated your January 17th order which
15 told them they were only to hand forms to people who initiated
16 conversations. Assuming that Mr. Isaac's testimony was
17 entirely credible and he did not minimize his involvement and
18 I'll make that assumption for the sake of argument only, if you
19 count, he passed out at least 30 forms with addressed envelopes
20 to people who never asked for the forms. Clearly, some of the
21 people had forms already, that's what his affidavit said, that
22 some of these garage managers had the forms so there's no
23 reason they would be asking him to give them a copy of the
24 form. It seems that word gets out that the company is passing
25 out exclusion forms to the point where some garage managers

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1 even asked Mr. Isaac, hey, I hear you're passing out exclusion
2 forms, give me an exclusion form. This is inherently -- and
3 they attach envelopes to the forms, which of course was never
4 part of the Court's order to make it easy to drop out of the
5 lawsuit. Judge, it's very hard to believe that when the boss
6 comes up to you, hands you an exclusion form with a
7 self-addressed stamped envelope that you're not supposed to
8 sign it and put it in the mail. And that's why we have this
9 flurry of withdrawals that are not at all representative of the
10 withdrawals until Mr. Isaac and aided by Mr. Kamm started
11 campaigning to get people out of the lawsuit.

12 Why did people drop out of the lawsuit? Because the
13 boss handed a form to them and because it didn't cost them
14 anything because GMC had already guaranteed it would make them
15 whole if they dropped out of the lawsuit and everybody trusts
16 GMC and their guarantee which should never have been revoked.
17 Your Honor, this is well beyond your order. It's improper in
18 any circumstance. I've cited some of those cases in my prior
19 correspondence to the Court. I believe that all of the post
20 January 17 exclusions should be struck because they were
21 gathered in an improper manner. Thank you.

22 MR. WEBER: There's nothing in the record that
23 supports one thing that Mr. Kahn said. Indeed, the opposite is
24 true. Everyone complied with your earlier order and that's why
25 it was not until we got guidance from your Honor that you saw

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1 the withdrawals until January. They didn't want to be a part
2 of this lawsuit. Half of them didn't understand what they were
3 getting into. I wanted Mr. Kamm to explain why the garage
4 managers felt that way, Mr. Stephen Kahn objected. These are
5 managers that get paid three times what the union contract
6 provides. They've been employed 10, 15, 20, 25 years. They
7 get paid extremely well. They are treated extremely well.
8 They like being managers, they like the title. They got great
9 benefits and great wages. This isn't some slum place. They
10 are they are very well treated and they don't want to be part
11 of this lawsuit and they withdraw on their own volition, not
12 because they were threatened.

13 You heard my guy Isaacs. He responded to requests.
14 He didn't go threaten them. Where are Mr. Kahn's witnesses to
15 say oh, I was pressured. Where are they today? They couldn't
16 come here and testify to the truth because in my opinion they
17 would be perjuring themselves. Nobody was pressured here.

18 Some members of the class wanted to stay in and they
19 have every right to stay in, and the majority in fact are in.
20 But some don't want to be, and if you looked at their history
21 with the company, they're long-term employees, treated well,
22 paid three times what the union contract requires. It's not a
23 surprise they would withdraw for that reason.

24 THE COURT: So, counsel, thank you for your
25 participation today in this hearing to help explore these

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1 important issues. Let me just give you some reactions to what
2 I've heard.

3 On November 23rd or so, the class action notice and
4 exclusion form was mailed, so that's roughly around
5 Thanksgiving time. We have our first request for exclusion
6 dated December 11th from a Mr. Tansey, and then we have two
7 early January requests that were entered on the court docket on
8 January 6 and January 9. I don't actually have the date that
9 the request, the exclusion form itself bears, and they came
10 from a Mr. Paillant and a Mr. Petit.

11 Then we have Mr. Herrera. I don't have the date on
12 his form, but it was entered on the court record on January 11.
13 And that's where things stood until January 24th. So we had
14 four requests for exclusion. I don't know how large the class
15 is, but there are 63 garages, so just a handful of requests for
16 exclusion. And then on January 24th to January 27th bearing
17 dates -- I shouldn't say that. The January 24th to
18 January 27th dates are when there was an entry on the court
19 record, which is less relevant, I suppose in some senses
20 perhaps than the records on the exclusion request forms
21 themselves. But we have with Mr. Sanchez' form which is dated
22 January 18th and was entered on the court record January 24th,
23 roughly 11 request forms that come within a few days of each
24 other. And two more that bear dates of January 3rd and
25 January 9th that are not entered on the Court record until

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1 January 25th and January 27th. They are Mr. Sam and
2 Mr. Rodriguez. Because I don't have, I'm not going to pull
3 out -- not Mr. Rodriguez, I'm sorry. Mr. Sam is dated
4 January 3rd entered on the court docket January 27th. Paul
5 Paillant is dated January 9th entered on the Court docket
6 January 25th.

7 So let's just talk in terms of roughly 11. It seems
8 pretty clear to me from the testimony here that two individuals
9 orchestrated a little campaign, Mr. Herrera and Mr. Sanchez, to
10 get some of their buddies to opt out. And to let the company
11 know that this was happening, and they even reached out to a
12 former employee, the son of our first witness. So I don't have
13 the basis to find that these 10 or 11 individuals actually on
14 their own, having thought about the notice form and the
15 decision to be made here, decided they wanted to opt out. I
16 have these 10 or 11 people responding to conversations with two
17 witnesses who were before me, Mr. Herrera and Mr. Sanchez, and
18 communicating their desire to Mr. Herrera and Mr. Sanchez that
19 they want to opt out and happy to receive such forms with
20 envelopes conveniently provided from a supervisor. And of
21 course as background the company has given assurance that
22 nobody will be receiving any less wages than are provided to
23 class members who stay in. So they curry favor with the
24 company by specifically asking a supervisor for the opt-out
25 form. The company conveys their desire that this happened,

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1 presenting them with envelopes, some of them conveniently
2 addressed. I don't think this is how the process is supposed
3 to work.

4 I think my endorsement did not help things. I should
5 not have permitted the company to pass out copies. There's too
6 much of a message that's given when that happens that we
7 actually want you to sign the form, particularly when envelopes
8 are presented with the package.

9 I don't know what precisely to do about this right
10 now. I think the people whose opt-out requests are affected
11 are Pablo Mayorgo, Mr. Baptiste, Mr. Soliman, Salvador
12 Rodriguez, James Isaac, Henry Russell, Emilio Orjuela, John
13 Camidge, Bolivar Cartabena and Angel Rosa. There may be a
14 couple of others in addition that are included in this suspect
15 class, but I'd have to look more carefully at the underlying
16 documents and learn more.

17 Mr. Weber?

18 MR. WEBER: Your Honor, I heard Mr. Isaac say that
19 managers approached Mr. Herrera for various reasons. They were
20 confused, they didn't get forms. I didn't hear Mr. Isaac say
21 Mr. Herrera sort of went out and rounded up the usual suspects
22 to get curry with the company. That's my understanding of what
23 the testimony was, and since Mr. Herrera was one of the early
24 opt outs, maybe word got out, as your Honor suggested, he opted
25 out, maybe others wanted to do the same. I didn't hear that

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1 Mr. Herrera went out looking for support. I heard something
2 else. I just want to make that observation.

3 THE COURT: Okay, well, we don't actually know, do we?

4 MR. WEBER: No, your Honor.

5 THE COURT: We don't have Mr. Herrera here, we don't
6 have Mr. Sanchez here, we don't have the opt outs. The
7 campaign that circumstantially, well, not just
8 circumstantially -- Mr. Isaac told us quite clearly that he
9 understood that everyone he spoke with and to whom he handed a
10 form had had a conversation before with Mr. Herrera and
11 Mr. Sanchez, one or the other. So Mr. Isaac isn't in a
12 position to know what those conversations were.

13 MR. WEBER: Your Honor, look at your order. I think
14 the order was complied with.

15 THE COURT: Well, I have to say I don't want to push
16 this further than we need to go. When we met last week we
17 talked about -- was it last week, the week before, whenever, we
18 talked about what is the purpose of this. Of course, you know,
19 potentially if there's a violation of the order there's an
20 inquiry with respect to contempt and other sanctions, but I
21 think we agreed at our prior conference the real purpose of
22 this is to find, to explore the legitimacy of the opt-out
23 process and to reflect on that and figure out what should be
24 done if the process for some reason has not worked as it
25 should.

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1 So I think what I would propose doing is that we all
2 reflect on what we've learned this afternoon. I don't think I
3 have to find that Mr. Herrera or Mr. Sanchez, if they did
4 conduct a little mini campaign here among their buddies -- by
5 the way, I don't know how many of them work at the same
6 garage --

7 MR. WEBER: All separate garages.

8 THE COURT: That was my understanding, so it means
9 they had to actually get on the phone, they had to make an
10 effort to communicate with these other folks. Whatever
11 happened, we'd need them before us to shed light on it. But
12 they were at the hub of communications that resulted in 10, 11,
13 12 people opting out during a very short period of time. And
14 with activity by the company which would have permitted each of
15 those opt out individuals to feel that the company was aware
16 they were opting out and appreciated that.

17 Now, I don't want to cast aspersions, I don't think we
18 need to do that on anybody's motives here who testified before
19 me today. I'm not anxious to go down that road. I don't know
20 that I need to. I think there is a larger question here,
21 though, about the legitimacy of this process with respect to
22 these 11 or so people.

23 Mr. Kahn?

24 MR. S. KAHN: Yes, if I might be heard. The Court
25 brings out a very important point. I never did apply for

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1 sanctions or contempt and I might have, but that doesn't really
2 interest me. What interests me is representing the members of
3 the class, not punishing the company and getting a remedy for
4 class members who did not receive their lawful overtime pay.
5 The company, unfortunately, abused the process and the well is
6 now poisoned. What one would wish one could do is put Henry
7 Russell on the witness stand and say Henry, what do you really
8 want here. But we can't do that anymore, Judge.

9 THE COURT: Mr. Kahn, I'm going to ask you to not --
10 to just reflect. I'm not going to ask you to make an
11 application now. I think we all need to think about this. And
12 then I would like Mr. Kahn and Mr. Weber to talk about it.

13 MR. S. KAHN: In my reflection, then, your Honor, and
14 I do think that's a very good idea because I know these people
15 have filed forms. The difficulty that I encounter and perhaps
16 the Court or Mr. Weber might figure out how to solve it is
17 there is now no way to find out what is in Mr. Henry Russell's
18 independent heart of hearts with regard to his participation in
19 this lawsuit. We just can't put the guy on the witness stand
20 in front of his company's lawyers and his company's
21 supervisors.

22 THE COURT: So, Mr. Kahn, I don't really think it's
23 helpful right now --

24 MR. S. KAHN: I apologize, Judge.

25 THE COURT: To just --

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1 MR. S. KAHN: I'm not making an application, your
2 Honor, I understand. I'm just troubled by that myself.

3 THE COURT: Okay. So you'll have a chance to think
4 about this. We have a schedule for a pretrial order and a
5 trial, and when counsel have separately reflected and then
6 talked to each other about it, I'll have separate or joint
7 applications or not. Thank you.

8 MR. SCHER: Your Honor, if I may, there was one
9 further issue. When we last met your Honor asked the parties
10 to confer jointly to see if we could come to a conclusion about
11 how to proceed in consolidation. I've attempted those
12 conversations with the parties. They seem to be progressing a
13 little bit more slowly than I had hoped they would by this
14 point, so I look to your Honor for guidance as to whether we
15 should take more time for those discussions or whether we
16 should proceed in some other way.

17 THE COURT: Well, Mr. Scher, I don't know what your
18 application is. Do you need more time?

19 MR. SCHER: Yes. Yes, we would like some more time to
20 work on a joint proposal.

21 THE COURT: Would you like a week?

22 MR. SCHER: Yes.

23 THE COURT: Good. Thank you.

24 MR. SCHER: Thank you, your Honor.

25 (Adjourned)